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In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 319.

JUAN PICO, *Plaintiff in Error,*

v.

THE UNITED STATES, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

Juan Pico was convicted of the killing of Go-Siengco (hereinafter called the Chinaman) and sentenced to life imprisonment, with the accessory penalties provided by the Philippine law (R. 107–110).

On appeal, the Supreme Court of the Philippine Islands modified the sentence by reducing it to imprisonment for 17 years 4 months and 1 day, and certain accessory penalties, and affirmed the judgment as so modified (R. 114–118).

To review that judgment Juan Pico sued out the present writ of error.

The trial court (R. 107) and the Supreme Court of the Philippine Islands (R. 114) have so carefully reviewed the testimony that their findings of fact should not now be disturbed.

STATEMENT OF THE CASE.

On March 1, 1909, at about 11 p. m., Juan Pico (who was the manager of a hacienda or ranch), accompanied by several of his employees and laborers, went to one of the houses on the ranch. On arriving at the front door Pico fired several shots from his shotgun; he went into the house, ascertained that there was a Chinaman there, and, on finding the Chinaman asleep, struck him with his gun to awaken him, and a struggle ensued. Under the direction of Pico, the Chinaman was taken out of the house, his arms were tied behind him, and he was made to march on foot about a half mile to Pico's house. Pico, and several others accompanying him, were on horseback, and two of his employees accompanied the Chinaman on foot.

During the march to Pico's house the Chinaman was several times struck by Pico with his gun and was roughly handled by the employees. The excuse offered by Pico and his employees for thus mistreating the Chinaman was the alleged refusal of the Chinaman to walk and his effort to escape. The refusal of the Chinaman to walk was more probably on account of his physical inability resulting from the beating he had just received. However that may be, by the time he was dragged to Pico's house, the Chinaman was in a state of utter collapse and exhaustion.

He was taken into Pico's office and laid on the floor, where he died about 4 a. m.

By 8 a. m. he was hurriedly buried; and on the same day one of Pico's employees (Baquiran), a petty official of the municipality, furnished a certificate to the municipal president that the Chinaman had died of heart failure, and gave as his authority the opinion of Dr. Teves, another of Pico's employees. (R. 8.)

Within a day or so something seems to have excited the suspicions of the municipal authorities, and the Chinaman's body was immediately exhumed. It showed evidences of violence, there being numerous discolorations and blood clots upon the body, with his "rectum protruding three or four centimeters."

Two of Pico's employees (Baquiran and Balayang, a mute) were promptly arrested for the murder; but a few days later they were dismissed, and Pico himself was arrested on March 15, 1909—just two weeks after the murder.

On March 26, 1909, Pico was tried for the murder before Hon. Richard Campbell, judge of the court of first instance, who heard a great deal of evidence (R. 13–106), and on April 3, 1909, rendered his decision, which contains a careful review of all the testimony (R. 107–110).

Decision of the trial court.

In that decision the court commented upon the demeanor of the different witnesses upon the witness stand, and his conclusion was largely reached from the appearance of the witnesses on the stand. He

said with reference to two of Pico's employees that, "having observed these men carefully while they were on the witness stand, the court does not believe their statements on this point" (R. 108).

Again, the court attached great importance to the testimony of another witness because he "manifested the utmost horror of what had taken place on the night in question," indicating "how the Chinaman had been tied and how the accused had struck deceased with the gun," and "his testimony bore all the evidences of truth." The court's decision was reached after pointing out an obvious deception on the part of the accused; and "taking into account all the personal circumstances of the witnesses and their conduct on the witness stand," the court was convinced that the accused is guilty of the crime charged beyond a reasonable doubt and without any qualifying circumstances.

This opinion of the Court of First Instance is entitled to the greatest weight here on the facts.

Decision of the Supreme Court of the Philippine Islands.

The Supreme Court of the Philippine Islands, in modifying and affirming the sentence, remarks that it is "the peculiar province of the trial court to resolve the question of credibility" (R. 115), and says (R. 116):

> We have read the evidence adduced on the trial with great care. The testimony of the witnesses Castellanes, Baquiran, Bienvenido

> Duarte, Anacleto Duarte, Magas, Balayang, Claravall, Banta, Bayad, and Eugenio, produced by the prosecution, is clear, direct, unequivocal, and powerful, disclosing no elements of untruth. Their probative force is overwhelming. They support in the very clearest and most forcible manner the findings of the trial court.

The Supreme Court of the Philippine Islands, however, modified the penalty from life imprisonment, etc., to one of a little over 17 years, as follows (R. 116):

> We have only one criticism of the judgment below. We are convinced that the court, in imposing the penalty, should have taken into consideration in favor of the accused the extenuating circumstance described in article 9, subdivision 3, of the Penal Code, namely, that "the delinquent had no intention of committing so grave an injury as that which he inflicted." There not having been present any aggravating circumstance, the penalty should have been imposed in its minimum degree.
>
> The judgment of the court below is hereby modified and the defendant is hereby sentenced to seventeen (17) years, four (4) months and one (1) day of cadena temporal, to the accessories provided by law, to indemnify the heirs of the deceased in the sum of one thousand pesos (₱1,000) and to pay the costs of the trial. So modified the judgment is affirmed, with the costs of this instance against the appellant.

ARGUMENT.

As the testimony appears in cold type, we have the case of a ranch owner, going at midnight with a body of his employees, to a farmhouse on his ranch, firing a shotgun at the door, entering, and, finding a Chinaman asleep, striking him with a shotgun, having him tied and forcing him to walk half a mile to his (the ranch owner's) house, beating him on the way, and taking him into the house in a state of collapse and exhaustion. The Chinaman dies in a few hours, his body is hurriedly buried, and, upon being exhumed, shows evidences of violence.

It is unnecessary here to go into any refined consideration of the value of the medical testimony concerning the cause of his death. The bare fact of an unoffending Chinaman being dragged out at midnight and beaten up, with his ensuing death a few hours later, when supported by the finding of the court which saw the witnesses is enough to establish for the purposes of this court that no substantial injustice has been done, and that the Chinaman met his death as the result of the injuries inflicted by Juan Pico.

In view of the findings of fact by the trial court and by the Supreme Court of the Philippine Islands, it is clear that there is testimony to support those findings, and that those findings are sufficient to to support the sentence.

It only remains to consider the strictly legal questions raised by the brief of the plaintiff in error.

There are no objections raised to the admission or rejection of evidence; and as the case was tried by the court, without the intervention of a jury, no question as to instructions arises.

It is simply a question under the Philippine law, *first*, whether the complaint supports the verdict, *second*, whether there is any evidence to support the findings of fact, *third*, whether the findings of fact support the sentence, and, *fourth*, whether the punishment inflicted is cruel and unusual, in violation of the Philippine Bill of Rights.

With the single exception of the question as to cruel and unusual punishment, none of the points urged in the plaintiff in error's brief is contained in the assignments of error (R. 127–131).

Assuming, however, that this court may notice the points raised in plaintiff in error's brief, even though not assigned, we will now review each of the grounds urged for the reversal.

FIRST POINT.

The complaint is sufficient to support a sentence for murder under the Spanish law.

The complaint charged that Juan Pico unlawfully and feloniously had the Chinaman tied by the neck and by the arms behind his back, rendering it impossible for the Chinaman to defend himself, and that Pico, with the intention of killing the Chinaman, struck him several blows with a shotgun, as the

result of which blows the Chinaman died, and that therefore Pico was guilty of

> the crime of murder, with the qualifying circumstance of *alevosia* (treachery), as defined and penalized in section 403 of the Penal Code. [The Penal Code of the Philippine Islands, Manila Bureau of Printing. 1911].

Article 403 of the Penal Code is as follows:

> The crime of murder is committed by any person who, not falling within the terms of the next preceding article [parricide], shall kill another under any of the following circumstances:
>
> 1. With *alevosia*.
> 2. For a price or promise of reward.
> 3. By means of inundation, fire, or poison.
> 4. With evident premeditation.
> 5. With cruelty, by deliberately and inhumanly, increasing the sufferings of the offended party.
>
> Any person guilty of murder shall suffer a penalty ranging from *cadena temporal* in its maximum degree to death.

Article 10 provides:

> The following are aggravating circumstances * * * That the act be committed with treachery (*alevosia*).
>
> There is treachery (*alevosia*) when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make.

The complaint certainly sufficiently alleges the crime of murder as defined by the Philippine Penal Code.

1. It alleges that Pico, with the intention of killing the Chinaman, struck him with a shotgun, as the result of which striking the Chinaman died. That certainly charges that Pico killed the Chinaman.

2. The complaint charges that Pico had his servants tie the Chinaman "by the neck and by the arms behind his back," "thus rendering it impossible for the Chinaman to defend himself." Those allegations certainly charge that the killing was committed with treachery (*alevosia*), which is defined as being the "employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make." When Pico had his servants tie the Chinaman by the neck and arms, so as to render it impossible for the Chinaman to defend himself, Pico was certainly employing means in the execution of killing the Chinaman which tended directly and specially to insure the killing without any risk to Pico from any defense which the Chinaman might make. It would be difficult to conceive any means that would fall more directly within the definition of *alevosia* than for one man to have his servants tie another so as to render it impossible for the other to defend himself, and then to strike him and kill him. That was a most peculiarly apt method to adopt in killing a man

which would directly insure the killing without any risk to the murderer arising from any defense which the victim might make.

It is difficult to follow the reasoning in the plaintiff in error's brief (pp. 15–17), because, while professedly dealing with the sufficiency of the complaint as a mere matter of law, it then mixes up questions arising on the evidence, which of course have no place in a discussion as to the sufficiency of the complaint itself.

The complaint was sufficient in alleging the crime of murder, with *alevosia;* and it certainly set out the means by which the killing was accomplished so as to bring those means within the definition of *alevosia*.

The Criminal Code of Procedure for the islands, as amended by General Orders, No. 58, series of 1900, provides, in section 6, that—

> A complaint or information is sufficient if it shows: * * *.
>
> 2. The designation of the crime or public offence charged.
>
> 3. The acts or omission complained of as constituting the crime or public offence in ordinary and concise language, without repetition, not necessarily in the words of the statute, but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to right. (Penal Code, edition of 1911, Appendix, p. 288.)

The complaint here is surely sufficient to "enable a person of common understanding to know what is

intended"—in other words, to enable such a person to know that it was intended to charge the crime of murder with *alevosía*. The elements of the offense which the plaintiff in error in his first point contends are omitted from the allegations of the complaint may clearly be supplied by easy inference from what is alleged. So the objection in any event is no more than an objection to the form of the complaint, and is taken care of by section 10 of the Criminal Code of Procedure, which provides that—

> No information or complaint is insufficient, nor can the trial, judgment or other proceeding be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits. (Id., p. 289.)

Furthermore, if the objection had really been important it could have been taken advantage of at the trial under section 9 of the Criminal Code of Procedure, which provides that—

> The information or complaint may be amended in substance or form, without leave of court, at any time before the defendant pleads; and thereafter, during the trial, as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. (Id., pp. 288–289.)

SECOND POINT.

The Supreme Court of the Philippine Islands had the right to modify the judgment of the trial court and to impose upon the defendant the modified sentence.

The penalty for murder (to wit, killing another with *alevosia*) may range from (1) *cadena temporal* in its maximum degree to (2) death. (Philippine Code, art. 403.)

Cadena temporal in its maximum degree is imprisonment which ranges from 17 years 4 months and 1 day to 20 years (art. 28), plus the accessory penalties provided for in article 56.

Therefore, upon the conviction of Pico of murder, the court had the right to give him a penalty of life imprisonment, for life imprisonment is a penalty ranging between (1) *cadena temporal* in its maximum degree and (2) death.

The Supreme Court of the Philippine Islands affirmed all the findings of the lower court with but a single criticism, which was that the lower court in imposing the penalty should have taken into consideration, in favor of the accused, the mitigating circumstance "that the offender had no intention to commit so great a wrong as that committed." (R. 116; Penal Code, art. 9.)

The Supreme Court unquestionably held that Pico was guilty of murder—that is to say, that he had killed a man *by means* which insured the killing *without any risk* to the murderer from the defense of the victim. But, on the other hand, the Supreme

Court seems to have thought that when the lower court imposed the penalty for murder it might fairly have taken into consideration that Pico did not intend to commit as great a wrong as he committed; and that therefore, under the peculiar theory of the Spanish law of balancing the circumstances under which a crime is committed, with a view to increasing or diminishing the penalty to be imposed, Pico was entitled to some reduction in the penalty. It is impossible for an American court to pass intelligently upon the peculiar methods of the Spanish law with reference to the infliction of penalties and their increase or reduction, according to the court's discretionary view as to the particular circumstances of the case.

Therefore, when the Supreme Court of the Philippine Islands decided that it had the power to reduce the sentence of Pico from life imprisonment to one of far less severity, this court should not review the power of the Supreme Court of the Philippine Islands thus to temper, under its local procedure, the judgment below.

Inasmuch as the complaint is sufficient to support the sentence of murder, and as the testimony was likewise sufficient to support such sentence, the plaintiff in error is in no position to complain of a reduction in his sentence, and it should be assumed by this court that the Spanish law authorized such a *remittitur*.

The argument on pages 18-25 of plaintiff in error's brief to the effect that, by modifying the judgment below, the Supreme Court *ex necessitate* decided that

Pico did not intend to kill the Chinaman, is contrary to the precise findings of the Supreme Court. It found that—

> if the testimony of the witnesses for the prosecution is true, the defendant is guilty. That he is guilty, if the witnesses for the Government are to be believed, is beyond the possibility of doubt. * * * We have read the evidence adduced on the trial with great care. The testimony of the witnesses [naming them] produced by the prosecution, is clear, direct, unequivocal, and powerful, disclosing no elements of untruth. Their probative force is overwhelming. They support in the very clearest and most forcible manner the findings of the trial court. (R. 115–116.)

This finding of the Supreme Court of the Philippine Islands confirms the finding of the trial court—

> "that the accused is guilty of the crime charged in the complaint beyond a reasonable doubt and *without any qualifying circumstances,*"

except as to the italicized words, "without any qualifying circumstances,"; which words are those to which the Supreme Court refers when it said that it had but one criticism of the judgment below, namely, that it failed to take into consideration "the extenuating circumstance" provided for in article 9.

We submit, therefore, that the Supreme Court gave to Pico the benefit of the qualifying or mitigating circumstance which the lower court had not accorded him, and, in doing so, it reduced his sentence materially. After all, the questions arising in the

Philippine Islands under the Philippine laws can best be settled by the local tribunals except where there be so clear a departure from the fundamental principles of justice that this court feels bound to interfere. All matters dependent upon the ordinary construction and application of the provisions of the Philippine Penal Code should be left to the decision of the courts accustomed to administering that system of jurisprudence. (See *Ker & Co.* v. *Couden*, 223 U. S. 268, 279.)

THIRD POINT.

There was some evidence to sustain the finding that the Chinaman died as the result of the blows inflicted by Juan Pico.

In the brief for the plaintiff in error (p. 25–48) there is an elaborate analysis and discussion of the testimony with a view to showing that the blows inflicted by Pico could not have produced the Chinaman's death, and that the medical evidence as to the cause of the Chinaman's death was given by medical men of limited experience, and was not sufficiently convincing.

Here, again, it is a question of fact, upon which two courts have passed and whose finding this court should not disturb.

We have the unquestioned fact that Pico beat the Chinaman with a gun, that the Chinaman was quickly in a state of exhaustion and collapse, and quickly died while in Pico's house and in Pico's custody. It

is unnecessary to go into any refined discussion as to the scientific relation between (1) the blows, (2) their effect upon the vital organs, and (3) the ensuing death. Common sense rescues us from such arguments. The beating with a gun, the death while in Pico's custody, the physical appearance of the body, and the testimony (ignorant, if you choose to call it) of the medical men, are at least sufficient evidence to support the finding below (especially as there is no evidence to the contrary).

On this writ of error it is not necessary that the proof should be conclusive to this court but only that there should be *some* substantial evidence to support the judgment below.

FOURTH POINT.

The sentence imposed is not a cruel and unusual punishment in violation of the Philippine Bill of Rights.

This was a conviction of murder. The imprisonment for 17 years, with its accessory penalties of deprivation during that time of the rights of guardianship, management of property, disposition of property, forfeiture of public offices, disfranchisement, disqualification to hold office in the future, loss of pensions, surveillance after the expiration of the sentence with the obligation to have a fixed place of residence, without power to change it, except on consent of the authorities, and to adopt some trade or industry unless having some other known means of support, is not a cruel and unusual punishment;

nor is it so disproportionate to the offense of murder as to constitute such a disparity betweeen the offense and the punishment as to shock the conscience, with the conviction that it is a cruel and unusual punishment. The discussion of this subject by the Supreme Court of the Philippine Islands is so clear and satisfactory that we refer to it as better than any argument that we could make. (R. 119–126.)

Obviously the crux of this point is reached when we come to consider the application of *Weems* v. *United States*, 217 U. S. 349. Standing by itself the case now presented to the court would not suggest any peculiar difficulty in settling the fundamental inquiry. On the surface, however, the *Weems* case may seem to dispose of the situation without more. But it is believed not.

It is not proposed to question the holding there nor the doctrines laid down. That is not necessary. The purpose is simply to examine the decision and the reasoning of the court with a view to establishing their precise relation to the situation that is actually presented here.

Weems was charged with and convicted of the falsification of a public and official document "by perverting the truth in the narration of facts"—that is, by means of a false entry—in violation of article 300 of the Penal Code of the Philippines. For this the same article prescribed the penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas. Weems accordingly was sentenced to "fifteen years of *cadena*, together with the accessories of section 56

of the Penal Code and to pay a fine of four thousand pesetas."

For the purposes of the decision it was assumed that one sentenced to *cadena* should labor for the benefit of the State, *always carry a chain* at the ankle hanging from the wrists, be employed at "hard and *painful*" labor, and receive no assistance whatsoever from without the institution—these by reason of articles 105 and 106. It was also taken for granted that he would be subject to all the accessories prescribed by article 56—that is, to civil interdiction, perpetual absolute disqualification, and subjection to surveillance during life as defined in articles 42, 31, and 43, respectively.

On this understanding it was held that the law—article 300—under which the sentence was imposed, was repugnant to the cruel and unusual punishment clause of the Philippine bill of rights, and as there was no other law under which he could be sentenced the proceedings against Weems were ordered dismissed.

It is of the greatest importance here to determine just what led the court to this conclusion.

The condemnation of the sentence seems to have been directed against several fairly distinct features. Some of the incidents and accessories were condemned in themselves, with the greatest emphasis laid, it would seem, on the provisions for *wearing chains*, for "hard and *painful*" labor, and for *surveillance for life*. (See p. 366, 377–378.) But the opinion discloses, we think, that the really funda-

mental objection to the sentence was not so much an absolute one extending to all cases as it was an objection relative to the *particular offense* in question. It was that the punishment "did not fit the crime"; that it had not been measured out by the law-making power appropriately to the character and degree of the crime; that the crime charged, falsification of a public document, was not such a heinous offense as to "justify" such a stern sentence; and in this aspect emphasis was put on the length.

See p. 365: "Independent of degrees." Reference to mere length in itself.

p. 368: Reference to Massachusetts case that imprisonment for long term of years might be so disproportionate to the offense as to be void.

p. 371: Reference to dictum of Field, J., in 144 U. S. 323, that inhibition directed not only against punishments which inflict torture, "but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."

p. 372–373: Reference to members of constitutional convention and that they must have had in mind laws other than those which inflicted bodily pain or mutilation and must have aimed at power of legislature to fix excessive terms of imprisonment with what accompaniments they might.

See p. 375: Reference to Cooley's statement that "probably any new statutory offense may be punished to the *extent* [italics the court's] and in the mode permitted by the common law for offenses of a similar nature;' and reference to a North Carolina case, where imprisonment for five years and bond to keep the peace for five years was held cruel and unusual.

p. 377: Conclusion that the law in question "is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. . . . Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."

p. 379: Reference to a consideration by the legislature of the mischief and the remedy in fixing punishment; and reference to degrees of burglary.

p. 380–381: Comparison with section 86 of Federal Criminal Code punishing the similar offense of embezzlement; and conclusion that the contrast "condemns the sentence in this case as cruel and unusual."

Such the dissenting opinion conceived to be the majority's chief objection, and such, we think, the whole impression of the majority opinion shows it to have been.

It remains to distinguish the present case.

Our contention is that the situation now presented is in reality an entirely different one; that it is so far removed from that on which the decision proceeded in the *Weems* case, especially with respect to the features of the sentence that determined the mind of the court there, that the decision now must be to uphold the law and the sentence under it; and further, that such a decision will be quite in accord with the doctrines there recognized.

This is based on the following propositions:

(A) The alleged requirement of "painful" labor becomes entirely unobjectionable in the light of an adequate translation of the code provision; while the provisions for carrying chains and for surveillance during life are to be disregarded, for they were in effect annulled on the American occupation of the Philippines.

(B) Construed in harmony with the foregoing, the sentence imposed under section 403 of the code, with respect both to the length of imprisonment and to the remaining accessories, is, even under the *Weems* case, not repugnant to the Philippine Bill of Rights; for so far from being beyond doubt unreasonable—and that would be the proper test—it bears relation to the character and degree of the offense which is obviously reasonable; and it is not "cruel" nor "unusual."

Considering these propositions at length:

A.

The alleged requirement of "painful" labor becomes entirely unobjectionable in the light of an adequate translation of the code provision; while the provisions for carrying chains and for surveillance during life are to be disregarded, for they were in effect annulled on the American occupation of the Philippines.

(1) The alleged requirement of "painful" labor may be put aside at once as affording no ground for objection. As the opinion of the Philippine Supreme Court points out (R. 121–122) the Spanish original of article 106 is not accurately rendered by the word "painful." *Penosos*, as the Spanish has it, rather conveys the notion of "laborious" or "that which causes hardship or involves great difficulty," and is used in conjunction with *duros* to give an intensive effect. More accurately, then, the provision is as it is given in the latest edition of the code: "They shall be employed in hard and burdensome labor." (Published by Bureau of Printing, Manila, 1911, see p. 35.) Nor do the words carry with them any "suggestion of physical or mental pain beyond that which is necessarily involved in the performance of enforced hard and laborious tasks by convicts." Thus understood the requirement can scarcely be said to be so different—if indeed it is different at all—from that which has always been and is enforced in the penal institutions of this country as to be clearly illegal.

The assumption that chains are used or that the law requires them was also not well informed. Inquiry has been made of the War Department and of the Philippine government, and in response it is cabled that although no special order can be found, yet—

> by reason of the treaty of Paris; the instructions of President McKinley to the Military Governor, General Merritt, of May 19, 1898; the proclamation of the latter on the capitulation of the Spaniards; and the general rule as to the continuation of the laws in a conquered or ceded territory, the article is considered as impliedly nullified and discontinued by reason of disuse.

The Philippine government replies also that the provision for surveillance during life has a like status.

In short, the punishment is not what it seems. Those elements that in the *Weems* case appear to have been considered repugnant to the Bill of Rights simply by reason of their intrinsic nature (irrespective of any question of apportionment to the degree of crime, 217 U. S. 366, 377) are in fact not comprehended in the law of the Philippines; nor, indeed, have they been at any time since the American occupation. So the supreme court of the islands has found its own law (R., 123–124), and so accordingly this court will be inclined to accept it to be. (See *Ker & Co.* v. *Couden*, 223 U. S. 268, 279.)

(2) It is important to consider further the theory on which we base the assertion that these provisions have in fact no existence in Philippine law.

(*a*) It would be desirable to be able to cite by volume and page a formal decree of annulment. Failure in this, however, is not fatal. The Philippine court discovers the existence in fact of such an order through a deduction based on the fact of the nonexistence of the practices in question and on principles of military administration. (R., 123–124.) The argument ought not to be difficult of acceptance. Given the fact—and so much must be accepted—that these penalties have been in disuse ever since the beginning of the American military occupation, it is certainly the reasonable and sensible conclusion, from a sound conception of military organization, that it was in pursuance of an order actually issued, probably informally. Nor can there be any doubt that it was entirely competent for the military authorities so to change the law during their formal occupation of the islands.

(*b*) But there is no need to work out the existence of an actual order. There is a more satisfactory basis. The objectionable provisions of the Philippine law went out automatically with the change of sovereignty. This was the result of a well-established principle of public or international law. The provisions were incompatible with American institutions. And while "whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country continue in force until abrogated or changed by the new government or sovereign," yet, "as a matter of course all laws, ordinances, and regulations in con-

flict with the political character, institutions, and constitution of the new government are at once displaced." (See *Chicago and Pacific Railway Co.* v. *McGlinn*, 114 U. S. 542, 546; *Downes* v. *Bidwell*, 182 U. S. 244, 298; *Ortega* v. *Lara*, 202 U. S. 339, 342; *Sanchez* v. *United States*, 216 U. S. 167; *Vilas* v. *Manila*, 220 U. S. 345, 357–358; *Fremont* v. *United States*, 17 How. 542, 565; 2 Halleck on International Law (3d ed.) 486–490; Davis on International Law (1903 ed.) 348; Risley, Law of War, 136; *Forbes* v. *Chuoco Tiaco*, 16 Phil. Rep. 534, 592.)

The principle, it is thus seen, has already been applied in this court to the case of the Spanish possessions. And it hits precisely the sort of municipal provisions now involved. It is said in the *McGlinn* case, and approved in *Downes* v. *Bidwell*, that—

> upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, *or authorizing cruel and unusual punishments*, and the like, would at once cease to be of obligatory force without any declaration to that effect. (182 U. S. 244, 298.)

That such was the actual result in the Philippines and that it was reached on this ground is seen from the statement by the Philippine authorities quoted above.[1]

[1] The instructions of President McKinley (referred to above in the cablegram of the Philippine government) to the Philippine Commission on the occasion of its succeeding to

The application of the rule—though frequently first made, as here, by the executive—is of course a *judicial* function as well. Thus in *Fremont* v. *United States, supra*, a Mexican law imposing disabilities on American citizens was determined to be "necessarily abrogated without a formal repeal" (17 How. 542, 565).

What is the rationale of the doctrine? What is the attitude of a court in applying it? Is the line of approach that taken in constitutional cases? These are questions that have a bearing here, particularly on the phase relating to the separability of the various features of the penalty imposed.

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the military authorities as the governing body of the islands should be considered rather as a ratification of the discontinuance by the military authorities of these objectionable penal features than as the first declaration of the discontinuance by the American Government. These instructions were given on April 7, 1900, and in the pertinent part they read as follows:

> Upon every division and branch of the government of the Philippines therefore, must be imposed these inviolable rules:
>
> That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel

First, then, what is the rationale? Halleck has put it as follows:

> When a country which has been conquered is ceded to the conqueror by the treaty of peace, the *plenum et utile dominium* of the conqueror will be considered as having existed from the beginning of the conquest. When it is said that the law political ceases on the conquest, and that the law municipal continues till changed by the will of the conqueror, it is not meant that these latter laws, *proprio vigore*, remain in force, but that, it is presumed, the new political sovereign has adopted them and continued them as a matter of convenience. They do not derive any force from the will of the conquered, for the person capable of having and expressing a will—the body politic, or law-making power of the con-

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and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder, or ex-post-facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed. (Philippine Commission, Public Laws and Resolutions, vol. 1, pp. XII–XIII.)

quered—is extinguished by the conquest. When, therefore, we come to pronounce upon the force of a law of the conquered people after the conquest, and to determine whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering State: that is, with the will of the conqueror as *expressed* by himself in similar matters. Whatever is in conflict with, or directly opposed to, such expressions of his will, we can not presume to have been adopted by his tacit consent. Hence, Lord Coke says, if a Christian king should conquer an infidel country, the laws of the conquered, *ipso facto*, cease, because it is not to be presumed that a Christian king has adopted the laws of an infidel race. But, where there is no such conflict in the institutions and laws of the two countries, those of the conquered which regulate personal relations, commercial transactions, and property in all its modes of transfer and acquisition, are presumed to have been adopted as a matter of convenience. This rule of international law is both reasonable and just. Each case must rest upon its own basis, and be judged of by its own circumstances. From this view of the jurisprudence of the conquered country, we must determine what laws of the acquired territory remain in force, and what laws of the conqueror, *proprio vigore*, extend over such territory. (International Law, 3d ed., vol. 2, pp. 488–489.)

Second. What is the attitude of the court; is the line of approach that taken in constitutional cases?

In the light of the underlying reason just given it must be clear that there is a distinction between the attitude taken in determining that a law is unconstitutional and that taken in finding that it has been displaced under this rule of public or international law. In the one case a provision is found not to be law because, although actually enacted by the legislative branch, it is repugnant to the Constitution; in the other it is found not to be law for the reason that although on the statute book yet (because it would have been incompatible with the institutions of the new sovereign) it was in fact never enacted by the law-making power. This is important on the problem of the separability of various provisions in a law—or, more accurately, shows that really there is no problem here. In a constitutional case involving a statute, part of which can be seen to be valid and part not, it may indeed be difficult to determine whether the legislature confronted by the choice would have enacted the valid alone. But in the other situation the very result of the rule is that objectionable provisions are not continued—that is, are not enacted—and there can be no difficulty as to the remaining provisions, for they are taken care of by the further policy of the rule that seeks to preserve native laws and institutions to the utmost possible extent.

The distinction has another aspect. It may be suggested that there is no difference between "repugnancy to the Constitution" and "incompatibility with American institutions" and that the case

really raises the question whether the Constitution extended to the Philippines with the treaty of cession. But it seems quite otherwise. The Constitution is in reality a formal supreme law, with the attributes of our conception of law—for instance, that it is a command, that it pervades, so to speak, and is coextensive with a definitely ascertained and bounded territory. "American institutions" can scarcely be said to be embodied as a formal law. The notion of territory does not seem necessary to the conception. Nor do they operate as a command; rather they appear as persuading precepts. At all events they are different. So it is not necessary to determine whether and to what extent the Constitution went to the Philippines with the treaty. It is to be remembered on this that the Philippine Bill of Rights was not passed till some years after the treaty.

Admittedly the notion conveyed by the term "American institutions" has been left vaguely defined. It is certainly not necessary—even if possible—to give a completely inclusive definition. It may include some of the institutions perpetuated by the Constitution though not all. Conceivably it might include institutions which are to be found in the Constitution, if at all, only through broad implications. Thus in *Sanchez* v. *United States* (*supra*, at p. 175) a system of selling official positions was said to be "inconsistent with the spirit of our institutions." It does not include everything preserved by the Bill of Rights, for trial without jury is tolerated

in the Philippines. But there seems little room for doubt that it does include the institution, if we may call it such, under which cruel and unusual punishment is condemned. So the court said in the *McGlinn* case and repeated in *Downes* v. *Bidwell, supra.*

In short, then, under this doctrine of public law the provisions of the Philippine penal code in question were before the adoption of the Philippine Bill of Rights in effect stricken out and the only question now is whether what remains is repugnant to the Bill of Rights.

B.

Construed in harmony with the foregoing, the sentence imposed under section 403 of the code, with respect to the length of imprisonment and to the remaining accessories, is, even under the Weems case, not repugnant to the Philippine Bill of Rights; for so far from being beyond doubt unreasonable—and that would be the proper test—it bears relation to the character and degree of the offense which is obviously reasonable; and it is not "cruel" nor "unusual."

All of the punishment really left for consideration are its length, its condition that the prisoner "shall receive no assistance whatsoever from without the institution," and its incidents or accessories of civil interdiction and perpetual absolute disqualification. Its length is 17 years 4 months and 1 day—this under article 96 of the code. The accessories are defined as follows:

> Art. 42. Civil interdiction shall deprive the offender, during the time of the sentence, of

the rights of parental authority, of guardianship, either as to the person or property of any ward, of the right of membership in the family council, of marital authority, of the right to manage his property, and of the right to dispose of such property by any act or any conveyance *inter vivos*. This rule is subject to exception in cases in which the law expressly limits the effects of this penalty. (P. 18, Philippine Penal Code, 1911.)

Art. 31. The penalty of perpetual absolute disqualification shall produce the following effects:

1. The deprivation of all honors and of any public offices and employments which the offender may have held, even if conferred by popular election.

2. The deprivation of the right to vote in any election for any popular elective office or to be elected to such office.

3. The disqualification for any honor, office, or public employment, and for the exercise of any of the rights mentioned.

4. The loss of all right to retirement pay or other pension for any office formerly held, but without prejudice to any allowance for living expenses which the Government may see fit to grant the defendant for any distinguished service.

The provisions of this article shall not affect any rights acquired at the time of the conviction by the widow or children of the offender. (Id., p. 17.)

None of these appears to have been regarded in the *Weems* case as absolutely objectionable from its very nature, and therefore as repugnant to the Bill of Rights no matter what the character or degree of the crime for which the law might impose it. Rather their cumulative impression of severity was contrasted with what was conceived to be the unimpressive character of the vice aimed at, and they were condemned for the unreasonableness of the contrast and for their obvious lack of relation to accepted theories of penology. (See 217 U. S. at pp. 365, 377, 379, 381, 385–387.)

From this viewpoint it must be clear that the present case discloses an essentially different situation. There is no such contrast between offense and punishment, no such lack of relation to what may be conceived to be imposed on the legislative discretion by the Bill of Rights. The thing is quite the other way. The offense committed, it is to be remembered, was *assessinato*, which corresponds to murder in the first degree as usually defined in this country (R. 119); the punishment imposed—that is, under the law as it really exists and is enforced—was, to repeat, just this: 17 years 4 months and 1 day of imprisonment at hard and difficult labor, with no assistance from outside the prison, and with the accessories of civil interdiction and perpetual absolute disqualification defined above. Whatever criterion is insisted on, can it be confidently felt that there is a fatal lack of relation here? The offense is the gravest known to

any jurisdiction of which our law takes account. And if the typical practice in American Commonwealths is to be the test, it certainly can not be said that the punishment is even substantially different from that actually prescribed here; much less that it is so much harsher and more shocking to American conceptions as to be under the ban as a cruel and unusual punishment. Indeed, so far as its term goes, it might well excite comment for its leniency. And it is not seen wherein its accessories differ in kind from the civil disabilities that attach to the status of the convict in common-law countries generally.[1]

If difference in degree is suggested, what is to be the test? How is it to be demonstrated that the legislature has clearly acted without judgment or with unrestrained power? At all events it would be difficult indeed to suggest a fair test by which the present case could be placed even within the zone of doubtful cases.

Nor is it apparent that the legislative motive has failed to reckon with theories of penal science. Whether as punishment, reformative agent, or preventive of crime the sentence seems even to supposedly enlightened American notions to have been prescribed with scientific restraint.

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[1] See article by Professor Henry Schofield in Illinois Law Review, vol. 5, pp. 327–334, to the effect that these accessories are not "punishments" anyway within the meaning of that word in the eighth amendment and the Philippine Bill of Rights.

C.

Assuming for the purpose of argument that the matter discussed above is not in the case, and that the objectionable provisions of the old law are in fact still in existence, there seems no good reason why recognition should not be given here to the principle that where a law is valid in one part and invalid in another, the invalid, if separable, may be disregarded and the valid enforced. So far as the structure of the code goes they are easily separable. Of course, the elimination of the objectionable portions can be effected only where it can be assumed that the legislature would have enacted the valid parts without the others. (*Employers' Liability Cases*, 207 U. S. 463, 501.) But this seems to be peculiarly the sort of case where that assumption can be indulged. The main thing, of course, is the imprisonment, is to lock the convict up, away from the rest of the world. The accessories were undoubtedly considered important, but can it be confidently assumed that, if they should fall, it was meant on that account to let the prisoner off altogether? (Cf. *United States* v. *Union Supply Co.*, 215 U. S. 50, 55.)

It is true this contention was made in the *Weems* case and was denied. (217 U. S. 381–382.) But since the court seemed to consider the imprisonment and the accessories to be invalid either separately or combined it must be taken that the remarks on their separability were not necessary to the decision. The *Union Supply Company's* case should therefore be allowed to stand.

Nor does it seem an insuperable objection to the application of this principle to say that the code was originally a Spanish enactment. (See 217 U. S. 382.) The incongruity of an investigation by an American court into the motives and mental processes of a Spanish legislature under a principle of American constitutional law may readily be admitted; but the code is in force now not as a Spanish enactment but by virtue of a decree, express or implied, of an American lawmaking power.

CONCLUSION.

An utterly unoffending Chinaman was dragged from his sleep at midnight by a group of men and beaten with a gun in the hands of Pico; and he died within a few hours while still in Pico's custody. The trial court (an American judge), who saw and heard all the witnesses testify, found that it was a cold-blooded murder and inflicted life imprisonment.

The Supreme Court of the Philippines, which did not have the advantage of seeing and hearing the witnesses testify, but only read the recital in cold type, thought that in imposing the sentence the lower court should have taken into consideration some extenuating circumstances as authorized by the peculiar provisions of the Spanish law; and therefore it *reduced* the penalty of life imprisonment to about 17 years, with a few accessory penalties which are not much greater than are imposed in this country under the parole system.

The lawyers trying the case in the Philippine Islands, and familiar with the laws, *did not even assign as error here the alleged errors now urged by the plaintiff in error's American lawyer.* That circumstance alone is quite persuasive that the points now urged would have no standing in a Philippine court.

The judgment should be affirmed, leaving Juan Pico to his remedy by application to the President for commutation of the sentence, if the Preisdent, on reviewing the record, should feel inclined to mitigate its severity.

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